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In the Supreme Court of the United States

October Term, 1980

JENNY MANSUKHANI,
Plaintiff and Appellee,
Petitioner,

vs.

DONALD AND JEAN PAILING,
Defendants and Appellants,
SANDY PAILING, JANE DOE AND
RICHARD ROE,
Defendants,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NORTH DAKOTA

WILLIAM R. MILLS, Counsel of Record
MILLS & MOORE LAW OFFICE
Box 518, 110 North 3rd Street
Bismarck, North Dakota 58502
Attorneys for Jenny Mansukhani

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

QUESTIONS PRESENTED FOR REVIEW

Does the suspension of the writ of habeas corpus by the Supreme Court of North Dakota in the matter of withholding children from the parents by strangers violate Article I, Section 9 of the United States Constitution?

Does the relegation of a parent seeking custody and visitation to a neutered status, that is of no greater right than any challenger, without any process of law whatsoever, violate the due process clause of the United States Constitution?

Does the disposition of custody of the children of a divorced parent as against nonparents based upon the best interest of the children deny the divorced parent equal protection of the law?

PARTIES

Jenny Mansukhani is the petitioner, appellee, plaintiff and mother. Donald Pailing is the appellant, defendant and grandfather. Jean Pailing is the appellant, defendant and grandmother. Sandy Pailing is the defendant and aunt. Richard Roe and Jane Doe are any other persons holding Jenny Mansukhani's children and were defendants.

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DONALD AND JEAN PAILING,
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Defendants,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NORTH DAKOTA

Petitioner prays for the issuance of a Writ of Certiorari to the Supreme Court of North Dakota to review the decision in the case of Jenny Mansukhani, Plaintiff and Appellee v. Donald and Jean Pailing, Defendants and Appellants, Sandy Pailing, Jane Doe and Richard Roe, Defendants.

OFFICIAL REPORT OF OPINION DELIVERED BELOW

The decision and opinion of the North Dakota Supreme Court in *Mansukhani v. Pailing* is reported in 300 N.W.2d 847 (ND 1980).

JURISDICTION

The statutory authority for issuance of a Writ of Certiorari is 28 U.S.C. 1257 wherein it is provided that the court is authorized to issue said writ in any case where a final judgment has been passed upon by the highest court of a state and where any title, right, privilege or immunity is specially set up or claimed under the Constitution of the United States.

The jurisdiction of this Court is invoked under the provisions of 28 U.S.C., Section 1257(3).

The decision and opinion of the North Dakota Supreme Court in *Mansukhani v. Pailing* was made and filed on the 19th day of December, 1980.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article I, §9, United States Constitution:

The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.

Amendment XIV, Sec. 1, United States Constitution:

All persons born and naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the States wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deprive any person within its jurisdiction of the equal protection of the laws.

STATEMENT OF FACTS

Jenny Mansukhani has not had the care, custody, control, supervision or company of her children for six months nor is it likely she will have for an additional twelve months, not because any court ever ruled she should not, but because the North Dakota Supreme Court suspended the Writ of Habeas Corpus.

When Jenny Mansukhani and her first husband, James Pailing, were divorced, Mrs. Mansukhani agreed to placement of their two children with James Pailing, their father. She retained and was given the right to custody overnight and on weekends. The children lived for three years with their father who usually lived with his parents, Donald and Jean Pailing and his sister, Sandy Pailing. On July 22, 1980, James Pailing died. On August 4, 1980, Jenny Mansukhani brought a Writ of Habeas Corpus against Donald, Jean and Sandy Pailing to obtain the release of the children from their possession. The Pailings appeared at the hearing on the writ and asked for a full evidentiary hearing on the issue of the best interests of the children. The trial court denied the full hearing because there had been no showing that Jenny Mansukhani was unfit. He granted the Writ of Habeas Corpus and ordered the children to be permanently turned over to Jenny Mansukhani following a one-month adjustment period. After the adjustment period, the Pailings appealed and had stayed by the North Dakota Supreme Court the transfer of the children. During the appeal period, the mother sought enforcement of her rights to custody overnight and on weekends. The trial court again granted such. The North Dakota Supreme Court stayed the order leaving contact between the mother and children solely within the discretion of the grandparents or aunt or their lawyer.

On appeal before the North Dakota Supreme Court were two issues. First, were the Pailings entitled to a full evidentiary hearing thus violating the time provisions of the Writ of Habeas Corpus? Second, can the "best interest of the child" standard be invoked by a nonparent against a parent without a showing of abandonment, unfitness or some other triggering circumstance?

The North Dakota Supreme Court reversed the lower court and sent the case back for a full hearing to determine the best interest of these children. In so doing, they declared that the Writ of Habeas Corpus is not available where a child is withheld from its parent. They also held that a parent has no greater rights to custody of his or her children than any other person.

The deprivation of due process and denial of equal protection of a parent relegated to nonparent status was first raised at the appellate level by the appellee, Jenny Mansukhani in her brief.

"The second concern of the Court in *Kottsick* was the possible constitutional problems of essentially finding a parent unfit without due process of law. This concern is equally applicable for Mrs. Mansukhani. In *Stanley v. Illinois,* 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 an unwed Father was entitled to a hearing on his fitness before his children were taken from him on the death of their mother. Without a hearing as to his fitness, he was denied Due Process. As this Court stated, '(I)f an unwed father has a right to a hearing as to his fitness, and *Stanley* has so held, the right of a married father, divorced from the mother, certainly cannot be any less.' *Kottsick,* 846. Obviously the transposition of sex from Father as in *Stanley* to Mother as in Mansukhani does not alter this Court's reasoning.

"Additionally, if a custody award is to act as a finding of unfitness, leaving only the best interest to remove the Children from the parent, not only due process is denied Mrs. Mansukhani but also equal protection under the Fourteenth Amendment. Divorced parents treated differently under the laws than are married parents or even unwed parents denies them equal protection. Also children of divorced parents are treated differently than children of married or unwed parents again violating their Fourteenth Amendment right." (Appellee's Brief, pp. 23, 24.)

The North Dakota Supreme Court eliminated the Writ of Habeas Corpus for a child detained from its parent on its own, without request, briefing, or argument by either party. The dangers and illegality of eliminating a speedy process of release of a detained child was raised by Jenny Mansukhani in her brief.

"A quick and summary procedure is vital. If a parent must await a full juvenile court investigation and full civil discovery to recover a child from a reluctant custodian, be it babysitter, relative or even kidnapper, great harm and injustice befalls both." (Appellee's Brief, p. 31.)

ARGUMENT

The Writ of Habeas Corpus has been used to obtain custody of children since 1913 in North Dakota. After 57 years, the Supreme Court of North Dakota eliminated this summary procedure for release of children substituting "an action or proceedings . . . using a complaint, petition or application stating the facts and the nature of the matter and the remedial relief sought . . . and requesting an evidentiary hearing." By eliminating the summary procedure, the Grand Writ, the Court violated Article I, §9 of the United States Constitution.

Two weeks after the father's death, the mother, Mrs. Mansukhani, obtained a Writ of Habeas Corpus. After an immediate hearing and a one-month adjustment period, the children were to be reunited with her. Then the nonparents appealed. Even though hastened there was no decision on the appeal until December of 1980. A judge was not finally assigned for a new hearing until February 16, 1981. Full civil discovery must now be done. After the hearing, there will be an appeal. It may well be another twelve months until this mother can guide, supervise, nurture, care for and have custody of her children. The delay caused by the elimination of the writ exacerbates these children's already sorry state. One of the children is mentally and emotionally handicapped, yet nothing is being done to help her. Both children are exceedingly undisciplined, yet the mother must sit back and allow this to continue satisfied only with an occasional short visit when the nonparents and their attorney consent to visitation. Summary release has been denied these children and they and their mother both suffer.

The substitution of a full-blown civil action does not provide an effective remedy for the test of the legality of the children's detention. The children withheld from their mother will not be released until full civil litigation with its concomitant delays for discovery, time to answer, and calendering have passed. Where there is the elimination of the writ by the substitution of a remedy, the elimination is unconstitutional unless the substitute is effective.

". . . the substitution of a collateral remedy which is neither inadequate nor ineffective to test the legality of a person's detention does not constitute a suspension of the writ of habeas corpus." *Swain v. Presley*, 430 U.S. 372, 381 (1977).

Once the petitioner does get into court, she finds that sometime during the delay, without a hearing or any legal

process she has lost her parental status. The North Dakota Supreme Court has declared that for this mother to be reunited with her children she must show it to be in their best interest.

This mother and the children's father divorced each other, and the children had to be placed with one parent or the other. As between the two, by agreement of the parents, with no finding of unfitness, the court placed the children with their father except for custody overnight and weekends with their mother. The decision was based upon the best interest of the children as between two parents, two parties of equal right.

When the father died two and a half years later, this decision as between the two parents was converted to one as between the mother and all claimants. She now has to show that the reunion of herself and her children is in their best interest, better than anyone else can offer.

This conversion from a determination of custody between parents to a stripping of parental priorities to their children was done without hearing or process. As such it is violative of both the children's and the mother's rights to due process guaranteed by the 14th Amendment of the United States Constitution.

The right lost by the petitioner is not minimal. In *Stanley v. Illinois*, 405 U.S. 645, 651, 92 S.Ct. 1208, this court restated the recognition of the importance of the family. The right to raise one's children is essential, basic civil rights of man, far more precious than property rights. And further, "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).

In *Stanley* a parent could not constitutionally have the custody of his children removed without a hearing as to his fitness. Yet the North Dakota Supreme Court has declared the mother's fitness to be irrelevant and she can be denied custody if it be in the best interest of the children. *Stanley* protected the rights of an illegitimate father, the petitioner is a divorced mother. This despite the determination by this Court that the family rights of a divorced parent are even greater than those of an illegitimate parent. *Quillon v. Walcott,* 434 U.S. 246. The divorced parent, as with the petitioner, has had actual and legal custody of these children and shouldered significant responsibility for them prior to the divorce.

Presented to the court here is the situation so abhorred by this court in *Quillon v. Walcott,* 255 in quoting Justice Stewart's concurrence in *Smith v. Organ of Foster Families For E. & Reform,* 431 U.S. 816, 97 S.Ct. 2094, 31 L.Ed.2d 551 (1977). "We have little doubt that the Due Process Clause would be offended 'if a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest,'." The father is dead and his objections, if any, are impossible to note. The children, ages four and six, are too young to express objections. The mother seeks to have her children released from the grandparents and returned to her. The mother and the children are the natural family. Only if the mother had been found to be unfit would the placement in the children's best interest be relevant. Until then, she and the children must be the family.

If the fact of the divorce is such as to trigger the best interest standard as between a parent and nonparent, then the petitioner has been denied the equal protection

of the laws contrary to the Fourteenth Amendment of the United States Constitution.

As a divorced parent, the petitioner must scramble with all interested caretakers for position of the provider of the best interest of the children. Were she still married to the father and the children's custody or possession withheld from her it appears from the North Dakota decision that they both would also be forced to undergo a civil proceeding with a full evidentiary hearing to regain custody of their own children. If, however, that is not the holding of the case, then she as a divorced parent is being treated differently than other parents, by the state, and is thus being denied the equal protection of the laws.

Again as in *Stanley* if an illegitimate parent is entitled to be treated as legitimate parents in the custody, care and nurturing of the children, so too must be the divorced parent.

CONCLUSION

The mother is not as rich nor is she as big and strong as the grandparents. She is not physically able to snatch her children back nor rich enough to hire someone to do so on her behalf. She has to rely on the law. But what law?

Habeas corpus is the only speedy relief she can have pending some final decree long down the road of justice. Have we come to the point where the Great Writ is reserved to the use of those accused of crime?

Dated this 18th day of March, 1980.

Respectfully Presented,

WILLIAM R. MILLS, Counsel of Record
MILLS & MOORE LAW OFFICE
Box 518, 110 North 3rd Street
Bismarck, North Dakota 58502
Attorneys for Jenny Mansukhani

APPENDIX

Jenny MANSUKHANI, Plaintiff
and Appellee,

v.

Donald and Jean PAILING, Defendants
and Appellants,
Sandy Pailing, Jane Doe and Richard
Roe, Defendants.

Civ. No. 9855.

Supreme Court of North Dakota.

Dec. 19, 1980.

Mother brought habeas corpus proceeding to obtain custody of her children after death of her ex-husband. The District Court, Burleigh County, Gerald G. Glaser, J., awarded mother eventual custody and immediate visitation rights, and paternal grandparents, who had actual custody of children after their son's death, appealed. The Supreme Court, Sand, J., held that: (1) where mother used a writ of habeas corpus, not to free her children from unlawful denial of their liberty, or to enforce a decree or judgment, but to obtain custody of the children, such proceeding required giving full faith and recognition to the legal and equitable concepts of the "best interests of the child;" (2) trial court erred in awarding mother custody of her children in habeas corpus proceeding, after paternal grandparents, who were caring for children after the death of the father made an adequate request before the trial court to convert the habeas corpus proceedings into an evidentiary hearing, which was necessary under the circumstances; and (3) where the district court issued a bench order allowing mother to immediate overnight visitation of her children, after the Supreme Court had issued a stay

of a previous district court order covering substantially the same subject, the bench order was null and void.

Remanded with directions.

1. Habeas Corpus (Key) 1

Habeas corpus is a summary proceeding primarily used and designed to liberate a person from illegal confinement.

2. Habeas Corpus (Key) 99(1)

When writ of habeas corpus is used to obtain custody of a child it becomes an equitable action in which equitable principles must be employed. NDCC 14-09-06, 32-22-01 et seq.

3. Habeas Corpus (Key) 99(1)

The objectives and procedures used in a writ of habeas corpus are unrealistic and inappropriate for determining the custody of a child, especially because of changed circumstances where the best interests of the child are involved, as the usual habeas corpus proceeding does not provide the aids and benefits which are associated with an evidentiary hearing and are essential in a child custody matter. NDCC 14-09-06, 32-22-01 et seq.

4. Infants (Key) 19.3(5)

Better practice than habeas corpus proceeding for a litigant seeking custody of a child because of changed circumstances is to initiate an action or proceeding by using a complaint, petition, or application stating the facts and the nature of the matter and the remedial relief sought, or by a motion if the parties are the same as those in the divorce decree or judgment, and requesting an evidentiary hearing whenever the evidence is in dispute. NDCC 14-09-06, 32-22-01 et seq.

5. Habeas Corpus (Key) 99(3)

Where mother used a writ of habeas corpus, not to free her children from unlawful denial of their liberty, or to enforce a decree or judgment, but to obtain custody of the children because of the death of her ex-husband, such proceeding required giving full faith and recognition to the legal and equitable concepts of the "best interests of the child." NDCC 14-09-06, 32-22-91 et seq.

6. Habeas Corpus (Key) 99(1)

Proceedings in habeas corpus to obtain custody of a child are governed by considerations of expediency and equity and should not be bound by technical rules. NDCC 14-09-06, 32-22-01 et seq.

7. Habeas Corpus (Key) 99(1)

Trial court erred in awarding mother custody of her children in habeas corpus proceeding, after paternal grandparents, who were caring for children after the death of their son, made an adequate request before the trial court to convert the habeas corpus proceedings into an evidentiary hearing, which was necessary under the circumstances. NDCC 14-09-06, 32-22-01 et seq.

8. Habeas Corpus (Key) 99(1)

In context of child custody proceeding, death of father, who was custodial parent of children, constituted a "change in circumstances," even though physical or actual custody was with the paternal grandparents.

See publication Words and Phrases for other judicial constructions and definitions.

9. Habeas Corpus (Key) 113(7)

Where the district court issued a bench order allowing mother to immediate overnight visitation of her children, after the Supreme Court had issued a stay of a previous district court order covering substantially the same subject, the bench order was null and void.

Mills & Moore, Bismarck, for plaintiff and appellee; argued by Sherry Mills Moore, Bismarck.

Chapman & Chapman, Bismarck, for defendants and appellants; argued by Daniel J. Chapman, Bismarck.

SAND, Justice.

Donald and Jean Pailing, the grandparents of the children, appealed from a district court judgment arising out of a petition for writ of habeas corpus and also from a district court bench order, all pertaining to the mother's visitation rights with her children.

James A. Pailing and Jenny Pailing were married and had two children, Jennifer Ann and Allen Anthony. On 4 Oct. 1977 they were divorced. Custody of the two minor children was awarded to James A. Pailing, the father, with "reasonable visitation rights including the right to have custody of said children overnight and on weekends" to the mother, Jenny Pailing. After the divorce, James Pailing, with the children, lived with his parents, Donald and Jean Pailing. The mother, Jenny Pailing, remarried and is now Mrs. Jenny Mansukhani. In July 1980 the father, James Pailing, was killed in an automobile accident. The children continued to live with their grandparents, Mr. and Mrs. Don Pailing.

The grandparents and the mother disagreed as to who should have custody of the children. Neither could they

agree on the conditions under which the mother could exercise her visitation rights. The mother filed a writ of habeas corpus petitioning the district court for custody of the children.

There was a dispute as to when the mother last visited the children, whether it was on 11 Dec. 1978, according to grandparents Pailing, or April 1979 according to the mother, Jenny M. Mansukhani.

After a brief hearing, the court issued a judgment containing the following pertinent provisions:

> "1. Jenny Mansukhani being the mother and having a priority over said children as such shall be awarded the custody.
>
> "2. There shall be a transitional period during which Jenny Mansukhani shall be entitled to the following visitation:
>
> That upon 24 hours notice to the Pailings, she may take the children from 8 o'clock a.m. to 8 o'clock p.m. the same day. On her fourth visit, she may have the children for a 48 hour period.
>
> "3. The transitional period shall end one week after Jenny Mansukhani has completed four visits made at least one week apart.
>
> "4. At the end of the transitional period, physical possession and custody of the children shall be transferred to Jenny Mansukhani."

The grandparents, Mr. and Mrs. Donald Pailing, filed a petition with the district court for reconsideration and a stay order, which was denied. The grandparents then appealed to this Court and sought a stay of the visitation order of the district court, which was granted. This was

followed by further proceedings in the district court resulting in a bench order allowing the mother to immediate overnight visitations. The bench order, upon application of the grandparents, was also stayed by this Court.

The principle issue is whether or not the procedures for writ of habeas corpus without an evidentiary hearing are appropriate for the determination of custody of the children. A related issue is whether or not the death of the father constituted a change of circumstances so as to modify the divorce decree and the custody judgment which did not provide with specificity the circumstances under which visitation could be had.

[1, 2] Generally habeas corpus is a summary proceeding primarily used and designed to liberate a person from illegal confinement. 39 Am.Jur.2d *Habeas Corpus*, §§ 2, 9. It is a common law prerogative writ and has been used in child custody matters for many years. 39 Am.Jur. 2d *Habeas Corpus*, §§ 8, 118. We can only speculate when it was first used in child custody cases and why it was used. However, when the writ is used to obtain custody of a child it becomes an equitable action in which equitable principles must be employed. *In re Wagner*, 84 N.W.2d 587 (N.D.1957).

[3] The writ of habeas corpus[1] has been used to obtain custody of a child since 1913, or earlier, in this State. *Knapp v. Tolan*, 26 N.D. 23, 142 N.W. 915 (1913). However, an examination of the general procedures and statutory provisions of Chapter 32-22, NDCC, relating and applying to habeas corpus, leads us to the inescapable conclusion that the objectives and procedures used in a writ

1. Section 14-09-06, NDCC, specifically provides that when the husband and wife are separated habeas corpus may be used to inquire into the custody of the child or children and may award custody to one or the other under such regulations as the case requires.

of habeas corpus unless substantially modified are unrealistic and inappropriate for determining the custody of a child especially because of changed circumstances where the best interests of the child are involved.

In a habeas corpus proceeding evidence is generally presented in the form of verified pleadings and affidavits. Consequently, if the evidence is in dispute, which usually is the situation in child custody matters where the best interests of the child are paramount, the judge as the trier of facts does not have the benefit of observing the demeanor of the witnesses (verifier of pleadings and affiants). Neither does the judge or the parties have the benefit of cross-examination. In addition, the affidavits are frequently couched in conclusionary statements consisting of an interrelated mixture of fact and law, making the decision more complex. The judge in a custody case has a most difficult responsibility. An evidentiary hearing would be of great aid and benefit to the judge in examining and weighing the evidence before making the all-important findings of fact.

The usual habeas corpus proceeding without substantial modification does not provide the aids and benefits which are associated with an evidentiary hearing and are essential in a child custody matter.

[4] It, therefore, seems logical, and we believe it would be more appropriate and would be a better procedure for a litigant seeking custody of a child because of changed circumstances,[2] to initiate an action or proceedings by using a complaint, petition, or application stating the facts and the nature of the matter and the remedial relief sought [see, *Galloway v. Pruitt*, 469 S.W.2d 556, 558

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2. The writ of habeas corpus is probably more pertinent in "child snatching" cases than in other cases because of the nature of the issue involved which comes close to liberating an "imprisoned" child.

(Ky.1971)], or by a motion if the parties are the same as those in the divorce decree or judgment, and requesting an evidentiary hearing whenever the evidence is in dispute.

We also believe that the trial judge will accord priority to proceedings of this nature and will expeditiously hear and determine the issues and exercise sound discretion, all within the framework of due process.

With reference to special procedural remedies, in *State v. Morrissey*, 295 N.W.2d 307, 309 (N.D.1979), Justice Paulson, writing for the Court, said:

> "Recently this court has experienced an increasing use among North Dakota practitioners of these somewhat antiquated and dust-laden procedural devices. [Writs of certiorari, mandamus, and prohibition.] It may well be time for the Legislature to take a long and searching look at these devices to determine how they fit into modern legal practices."

To this we add that the time may be appropriate for the Legislature to review all of the special proceedings under the title "Judicial Remedies" with a view of bringing them in line with the modern practice which no longer employs the strict common law pleading. In making this observation we are not suggesting the elimination of habeas corpus which is protected by Section 5 of the North Dakota Constitution providing that the writ of habeas corpus shall not be suspended except under certain conditions. We are merely observing that a writ of habeas corpus was not designed for matters other than originally intended. Other proceedings may be employed as mentioned earlier herein. We note that the various writs which were formerly found in Sections 87 and 103 of the old Judicial Article have been removed and are now merely referred to as writs necessary to the proper administration of justice in Sections 92 and 86 of the new Judicial Article.

In the instant case, based upon the hearing and proceedings before the trial court on 17 Oct. 1980 there appears to be a mild confusion, or at least some uncertainty, as to what specific remedy Jenny Mansukhani sought. It appears that the mother, Jenny Mansukhani, sought actual custody of the children as distinguished from visitation rights. Her custody claim is predicated on the premise that when the father died she automatically became entitled to custody of the children. In any event, or at the very least, she contended she is entitled to continued visitation rights in accordance with the divorce decree. The divorce decree merely provided for "reasonable visitation rights including overnight and weekend visits" without spelling out the details. Furthermore, prior to the father's death any agreement that may have existed between the father and mother as to visitation rights was not in writing.

[5] Relying on the judgment issued in the instant case, the writ was not used to free children unlawfully denied of their liberty or to enforce a decree or judgment but was used in an effort to obtain custody of the children because of changed circumstances which requires giving full faith and recognition to the legal and equitable concepts of the best interests of the child.

[6] We share the concern of the trial court as garnered from the record that the writ of habeas corpus[3] is simply not designed to meet the basic judicial procedures and requirements for determining the custody of a child.

[7] The grandparents made an adequate request before the trial court to convert the habeas corpus proceedings into an evidentiary hearing, which we believe is necessary under the circumstances in this case. We be-

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3. Proceedings in habeas corpus to obtain custody of a child are governed by considerations of expediency and equity and should not be bound by technical rules. *Gray v. Maxwell*, 206 Neb. 385, 293 N.W.2d 90 (1980).

lieve the ends of justice will be better served if an evidentiary hearing is held and, accordingly, the judgment of the district court is vacated and the case is remanded in line with the views expressed in this opinion for an evidentiary hearing.

[8] We conclude that the death of the father, who had legal custody of the children, constitutes a change in circumstances even though physical or actual custody was with the grandparents. The court, however, must take into account all of the surrounding circumstances in reaching its decision.

[9] The bench order[4] of the trial court issued on 17 Oct. 1980 was issued after the notice of appeal was filed with the clerk of court on 10 Sept. 1980 and after the Supreme Court had issued its stay order on the 12th day of September, 1980, covering substantially the same subject, and under these circumstances the bench order was and is null and void.

On remand, we invite the trial court's attention to the principles of equity and law expressed in *Hust v. Hust*, 295 N.W.2d 316 (N.D.1980); *J. L. R. v. Kidder County Social Services Board*, 295 N.W.2d 401 (N.D.1980); *In Interest [Custody] of D. G.*, 246 N.W.2d 892 (N.D.1976); *Bjerke v. D. T.*, 248 N.W.2d 808 (N.D.1976); and *McKay v. Mitzel*, 137 N.W.2d 792 (N.D.1965), together with other citations and case law referred to by the above cases on the subject matter.

These cases clearly express the rule of law that the court must be concerned with the best interests and welfare

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4. Because of the disposition of the bench order, it will not be necessary to resolve whether or not the bench order is appealable. Nevertheless, because the subject matter involves the basic jurisdiction of the court, we state this caveat that a party filing a notice of appeal on a bench order will have the full responsibility of convincing this Court that the order is appealable under the laws of this State.

of the child by taking into account all of the pertinent facts and surrounding circumstances which may have a bearing on or influence the child's welfare. Some of these cases also establish that the rights of a biological parent are not necessarily always paramount but must be balanced with the best interests and welfare of the child.

This case is remanded with directions to hold an evidentiary hearing to determine whether the mother or grandparents shall have custody of the children and who may have visitation rights with conditions, if any.

ERICKSTAD, C. J., and VANDE WALLE, PEDERSON and PAULSON, JJ., concur.

STATE OF NORTH DAKOTA
COUNTY OF BURLEIGH

IN DISTRICT COURT
SOUTH CENTRAL JUDICIAL DISTRICT

Jenny Mansukhani, Petitioner,

vs.

Donald Pailing, Jean Pailing, Sandy Pailing, Jane Doe, and Richard Roe, Respondents.

State of North Dakota)
) ss
County of Burleigh)

PETITION FOR WRIT OF HABEAS CORPUS

Comes now the petitioner, Jenny Mansukhani, and for her cause of action alleges and states:

1. That she does hereby apply for a Writ of Habeas Corpus based upon her affidavit attached and such further and additional evidence as may be produced at the time of the hearing.

2. That Jenny Mansukhani is the natural mother of two minor children, Jenny Pailing and Allen Anthony Pailing (hereinafter referred to as the Minor Children.)

3. That the Minor Children are presently being held by Donald Pailing, Jean Pailing, Sandy Pailing and others at 3201 E. Rosser Avenue, Bismarck, North Dakota.

4. That James Pailing the natural father, was awarded custody of the children by a divorce decree in a default hearing in Mclean County in October of 1977.

5. That Jenny Mansukhani (then Pailing) was awarded visitation including overnights and weekends and was not and could not be found to be an unfit parent.

6. That the natural father James A. Pailing was killed in an automobile accident on July 22, 1980.

7. That the petitioner, Jenny Mansukhani, has demanded and been refused visitation outside the home of the respondents or custody of the children by the Pailings.

8. That Jenny Mansukhani on behalf of the children hereby applies for the issuance of a writ of habeas corpus directing the release of the minor children into her custody.

9. That further the petitioner, Jenny Mansukhani further seeks an order of the court awarding her custody of the children pending any further proceedings.

I, Jenny Mansukhani, do swear that the above petition is true and accurate in all respects.

/s/ Jenny Mansukhani
Jenny Mansukhani

Subscribed and sworn to me this 4th day of August, 1980.

/s/ Sherry Mills Moore
Sherry Mills Moore, Notary Public
Burleigh County, North Dakota
My Commission Expires 12/4/85

/s/ Sherry Mills Moore
Sherry Mills Moore
Attorney for Petitioner
Box 518, 110 North 3rd Street
Bismarck, North Dakota 58502

STATE OF NORTH DAKOTA
COUNTY OF BURLEIGH

IN DISTRICT COURT
SOUTH CENTRAL JUDICIAL DISTRICT
CIVIL NO. .....

Jenny Mansukhani,
Petitioner,

vs.

Donald Pailing, Jean Pailing, Sandy Pailing, Jane Doe, and Richard Roe,
Respondents.

WRIT OF HABEAS CORPUS

TO: Donald Pailing, Jean Pailing, Sandy Pailing and Jane Doe and Richard Roe:

You are hereby commanded to have Allen Anthony Pailing and Jennifer Pailing by you detained, as is alleged, together with the time and cause of such imprisonment and detention by whatever name the said Donald Pailing, Jean Pailing, Sandy Pailing, Jane Doe and Richard Roe shall be called before Judge Gerald Glasser, Judge of the District Court, at 9:30 a.m. on August 8, 1980, to do and receive what shall then and there be considered concerning the said Allen Anthony Pailing and Jenny Pailing, and have you then and there this writ.

By The Habeas Corpus Act
/s/ Gerald G. Glaser
Judge Gerald Glaser

STATE OF NORTH DAKOTA
COUNTY OF BURLEIGH

IN DISTRICT COURT
SOUTH CENTRAL JUDICIAL DISTRICT

CIVIL No. 29959

Jenny Mansukhani,
Plaintiff,

vs.

Donald & Jean Pailing, Sandy Pailing,
Jane Doe and Richard Roe,
Defendants.

ORDER

The above entitled matter having come on for hearing at 9:30 o'clock a.m. on the 8th day of August, 1980, and there appearing Jenny Mansukhani, the mother of Allen Anthony and Jennifer Ann Pailing, together with her attorney, Sherry Mills Moore and there also appearing Donald and Jean Pailing the grandparents of said children and Sandy Pailing, the aunt of said children, together with their attorney, Carma Christensen and the parties having submitted their evidence and the Court having heard the evidence and the arguments of counsel and being fully advised in the premises makes the following:

FINDINGS OF FACT

1. Jenny Mansukhani is a fit and proper person for the care and custody of the children Allen Anthony Pailing and Jennifer Ann Pailing.

2. Donald and Jean Pailing, the grandparents of said children are fit and proper persons for the care and custody of the children.

From the foregoing Findings of Fact, the Court makes the following:

CONCLUSIONS OF LAW

1. Jenny Mansukhani being the mother and having a priority over said children as such shall be awarded the custody.

2. There shall be a transitional period during which Jenny Mansukhani shall be entitled to the following visitation:

That upon 24 hours notice to the Pailings, she may take the children from 8 o'clock a.m. to 8 o'clock p.m. the same day. On her fourth visit, she may have the children for a 48-hour period.

3. The transitional period shall end one week after Jenny Mansukhani has completed four visits made at least one week apart.

4. At the end of the transitional period, physical possession and custody of the children shall be transferred to Jenny Mansukhani.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated this 11th day of August, 1980.

/s/ Gerald G. Glaser
Judge Gerald Glaser

STATE OF NORTH DAKOTA
COUNTY OF BURLEIGH

IN DISTRICT COURT
SOUTH CENTRAL DISTRICT

Civil No. 29959

Jenny Mansukhani,
Plaintiff,

v.

Donald and Jean Pailing, Sandy Pailing,
Jane Doe, and Richard Roe,
Defendants.

MEMORANDUM OPINION

I have considered the petition for reconsideration and stay of execution of judgment.

I was aware of the decisions cited therein but did not consider them appropriate. The decision was based upon the record before me and is in accordance with fundamental concepts, to wit: that a natural parent, whose parental rights have not been terminated and against whom there has been no determination of unfitness, is presumptively entitled to regain physical possession of the child upon the death of the other parent.

I note the reference to a motion for new trial. That motion will be heard when duly entered.

The children will not be adversely affected if they remain in the custody of their mother pending decision thereon. The request for a stay is therefore denied.

Signed this 12th day of September 1980, at Bismarck, North Dakota.

BY THE COURT:

/s/ Gerald G. Glaser
Gerald G. Glaser, District Judge

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

File No. 9855

Jenny Mansukhani,
Plaintiff and Appellee,

vs.

Donald and Jean Pailing, Sandy Pailing,
Jane Doe, and Richard Roe,
Defendants and Appellants.

ORDER GRANTING STAY

The Court had under consideration a Petition for Stay of Execution Pending Appeal in this case, filed by counsel for the Defendants and Appellants.

ORDERED, that the Supreme Court hereby grants a stay of execution of judgment pending final determination of the appeal from the Judgment dated August 22, 1980. This Order is entered subject to Rule 27(b), NDRAppP.

The Supreme Court of the State of North Dakota convened at 4:45 p.m. this 12th day of September, 1980, with the Chief Justice, the Honorable Ralph J. Erickstad; the Honorable Wm. L. Paulson, the Honorable Vernon R. Pederson, the Honorable Paul M. Sand, the Honorable Gerald W. VandeWalle, Justices; and the Clerk of the Supreme Court, Luella Dunn, being present and directed the entry of the above order.

/s/ Luella Dunn
Luella Dunn, Clerk
North Dakota Supreme Court

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

File No. 9855

Jenny Mansukhani,
Plaintiff and Appellee,

vs.

Donald and Jean Pailing, Sandy Pailing,
Jane Doe, and Richard Roe,
Defendants and Appellants.

ORDER

A Motion to Vacate Stay of Execution Pending Appeal was filed on behalf of Plaintiff-Appellee on September 19, 1980. After consideration the Court:

ORDERED, that further consideration and determination of the Motion will be made on the pleadings after Appellant's response to the Motion to Vacate Stay of Execution Pending Appeal has been served and filed with service and filing to be made no later than 4:00 p.m., September 25, 1980.

The Supreme Court of the State of North Dakota convened at 4:00 p.m. this 22nd day of September, 1980, with the Chief Justice, the Honorable Ralph J. Erickstad; the Honorable Wm. L. Paulson, the Honorable Vernon R. Pederson, the Honorable Paul M. Sand, the Honorable Gerald W. VandeWalle, Justices; and the Clerk of the Supreme Court, Luella Dunn, being present and directed the entry of the above order.

/s/ Luella Dunn
Luella Dunn, Clerk
North Dakota Supreme Court

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Case No. 9855

Jenny Mansukhani,
Plaintiff and Appellee,

vs.

Donald and Jean Pailing, Sandy Pailing,
Jane Doe, and Richard Roe,
Defendants-Appellants.

MOTION TO VACATE STAY OF EXECUTION PENDING APPEAL

Comes now the Appellee in the above entitled matter who moves to the Supreme Court to Vacate the Stay of Execution pursuant to Rules 27(b) of the Rules of Appellate Procedure for the following reasons and upon the following grounds:

I

That the petitioner, Jenny Mansukhani, is the mother and sole living parent of Jennifer Pailing and Allen Anthony Pailing and will be hereinafter referred to as Mother. That James Pailing, now deceased, is the Father (hereinafter referred to as Father), Jean Pailing is the paternal Grandmother (hereinafter referred to as Grandmother), Donald Pailing is the Grandfather (hereinafter referred to as Grandfather except when referred to collectively along with Jean Pailing as the Grandparents), and Sandy Pailing is the Aunt (hereinafter referred to as Aunt) of Jennifer Pailing, and Allen Anthony Pailing (hereinafter referred to as the Children).

II

That the Children lived in the home of the Mother until she, no longer able to financially support them, agreed to relinquish custody to the Father subject to ample visitation (Mother's September Affidavit, P. 1; Mother's July Affidavit, P. 1). That the Children lived in the home of the Father from this time until his death on July 22, 1980.

III

On August 4, 1980, a Petition for Writ of Habeas Corpus was filed with the South Central District Court and was granted on August 4, 1980. The Writ demanded to know why the Children were being withheld from their legal custodian - the Mother.

IV

A hearing was held, testimony given, and appearances made by all parties represented by counsel. The Court heard the evidence and after argument by counsel for both parties made a decision. The Court's decision was that the Grandfather, the Grandmother, the Aunt and other parties had not shown cause why they were withholding the Children from the legal custodian, their Mother. (Court Order, August 11, 1980).

V

To ease the transition from the home of the Father to the home of the Mother, the Court ordered a period of visitation between the Children and the Mother prior to permanently joining their Mother. (Court Order, August 11, 1980).

VI

That the transition visitation was completed by the Mother as were all necessary preparations for their reunion. (Mother's September Affidavit, P. 2 and 3).

THE CLANDESTINE CONDUCT OF THE GRANDPARENTS AND COUNSEL HAS AND IS HARMING THE CHILDREN AS WELL AS IMPENDING JUSTICE.

VII

On September 10, 1980, counsel to the Grandparents prepared a Notice of Appeal, Undertaking on Appeal, Petition for Reconsideration and Stay of Execution of Judgment. Sometime between September 10th and September 12th, the Petition for Reconsideration and Stay of Execution of Judgment was considered and denied by Judge Glaser, South Central Judicial District. (Petition for Reconsideration and Stay of Execution of Judgment, Memorandum Opinion).

VIII

Sometime subsequent to Judge Glaser's decision of September 12th, a Petition for Stay of Execution Pending Appeal was filed with the Supreme Court. At 4:45 P.M. on Friday, September 12, 1980, the Supreme Court reviewed the Petition and granted the Stay. (Order Granting Stay).

IX

That on September 15, 1980, counsel for the Plaintiff learned that the Defendants had engaged new counsel, that the Defendants had filed a Petition for Stay of Execution Pending Appeal in the Supreme Court and by the attachment thereto that counsel for the Defendant had filed a Petition for Reconsideration and Stay of Execution of Judgment Pending Appeal in the South Central Judicial District Court. From the Clerk of Court of the South Central Judicial District, the Plaintiff's counsel learned the District Court had denied the Petition for Reconsideration and Stay of Execution of Judgment Pending Ap-

peal. From the Clerk of the Supreme Court, Plaintiff's counsel learned the Supreme Court had granted the Petition for Stay of the Execution Pending Appeal.

X

That on September 16, 1980, the Plaintiff's counsel received from the Clerk of the District Court Notice of Filing of Appeal, Notice of Appeal and Undertaking of Costs on Appeal.

XI

That the Plaintiff was completely uninformed until three days to five days after the fact that not one but two bodies of the judicial system were deciding without any input from the Mother whether her in-laws could detain her children, a decision which defacto terminates her parental rights. (Mother's September Affidavit, P. 4 and 5).

XII

That *no* notice, let alone reasonable notice, as required by Rule 8(b) of the Rules of Appellant Procedure, was given the Plaintiff.

XIII

The Plaintiff does not here seek to indulge in mere procedural whining but has lost her parental rights, without notice or opportunity to oppose this matter of substance.

XIV

That while the Grandparent's counsel was busy pursuing clandestine methods to allow the Defendants to continue to withhold the Mother's Children from the Mother, the Grandparents themselves were working to deflect the

Mother's attention by appearing to comply with the Court Order of August 10, 1980. (Mother's September Affidavit, P. 3).

XV

That the District Court in its decision of August 10, 1980, determined that the Grandparents had not shown good cause why they were and should withhold the Children from the Mother. To smooth the transition from the Father's home to the Mother's home, the Court also ordered a visitation period. The visitation would then lessen the impact of a sudden shift where one had just occurred, that is from the Father to the Grandparents, Aunt and others. During the transition, the Children were to become re-accustomed to the authority of the Mother and acquainted with their Stepfather, Stepsister and new home in Surrey, North Dakota.

XVI

That the Grandparents gave every indication that they too were abiding by the Court's decision. This act by the Grandparents led the Mother down the primrose path who as a result took the Children in the same direction by telling them of their pending move to Surrey, acquainting them with their Stepfather and Stepsister, reuniting them with their maternal Grandparents and other relatives and smoothing the way for their transfer. (Mother's September Affidavit, P. 2 and 3).

XVII

That after the fourth visit, the Mother wrote the Grandparents to tell them she would pick up the Children and their belongings on September 12, 1980, at 10:00 A.M. She later phoned to confirm it and was told she should

wait until 4:00 P.M. when Jennifer would finish kindergarten. She was called on September 11th and told that in fact the Order stated she was to pick up the Children one week from the completion of the last visit which in the interpretation of the Grandparents was September 14, 1980, not September 12, 1980. She agreed to pick up the Children on September 15, 1980, at 10:00 A.M. That not until September 13, 1980, at 9:00 A.M. was she informed, through another telephone call from the Grandparents, that she was not to call for the Children on the 15th because they belonged to the Grandparents until the end of the Court actions. (Mother's September Affidavit, P. 4 and 5).

XVIII

That until September 13, 1980, at 9:00 A.M., the Mother was led to believe by the Grandparents that they were complying with the Court Order. That in fact the Grandparents were transposing their schizophrenic behavior onto the Children by contemporaneously telling the Children that they were to move out of the two-bedroom apartment occupied by the four (now three) adults and two children into a new one, not in Minot but Bismarck, in which each child was to get his own room. That the Children were quickly enrooted in the community by enrollment in swimming lessons and, for Jennifer, in kindergarten. That while the Mother obeyed the Court's Order in undertaking the true nature of the Court's purpose in establishing a transition period, the Grandparents used the same period to quickly attempt to make themselves the psychological parents only to buttress a lawsuit. Yet, even worse, they also used the period to dissuade and in fact poison the Children's minds against their Mother. (Mother's September Affidavit, P. 3 and 4).

XIX

That contrary to the Grandmother's Affidavit but consistent with her testimony at the trial, the Father indeed played a strong role in the Children's life. He was the psychological parent as well as the actual parent. His death caused the loss of a psychological parent. It is doubtful that the Grandparents became the psychological substitutes between July 22nd and August 4th, 1980. (Mother-er's September Affidavit, P. 2).

XX

That contrary to the Grandmother's Affidavit but consistent with her testimony, "the only home the Children have known" since 1976 was in fact that of the Father, James Pailing. The Father's home often coincided with that of the Grandparents but also with the Aunts and the Uncles. That in fact the Children have been shifted from building to building and adult to adult since December, 1976. That the "only home the Children have known" has not only been one of a changing cast of characters but also stages. The Father, the Aunt, the Grandparents moved five months before the hearing from the "only home the Children have known" since December - Butte, North Dakota - to their two-bedroom apartment in Bismarck. This apartment is occupied by a present known cast of characters of the Grandparents and the Aunt and is the home from which to remove them would allegedly cause such irreparable harm. (Mother's September Affidavit, P. 2).

XXI

That contrary to the Grandmother's Affidavit but consistent with the Return to Motion, the testimony of the Grandmother and the Mother, the Mother did in fact exercise her visitation rights. On many occasions the Mother

exercised her visitation rights with the Children to the full extent allowed by, not the Court, but by James Pailing. That even after the many requests as well as consultations with legal counsel and contrary to the decree, the Mother was prohibited by the Father from having the Children overnight or on weekends. That her visits were within the emotional and physical restraints of the presence of the Father, the Aunt, the Grandmother, the Grandfather as well as others. (Mother's September Affidavit, P. 2 and 3).

XXII

That contrary to the Affidavit of the Grandmother but consistent with the Grandmother's testimony as well as the Affidavit of the Mother, the Children do know the Mother well enough to call her "mama" and to express their love for her. That no one else in the Children's lives is known as "mama" or anything close by the Grandmother's own testimony at trial. (Mother's September Affidavit, P. 3).

XXIII

That the District Court who heard the testimony and saw the parties was well aware of the length of separation between the Mother and the Children but still found her to be a fit and proper parent. (Court Order, August 11, 1980; Memorandum Opinion, September 12, 1980).

XXIV

That contrary to the implication of the Grandparent's petition but consistent with the testimony and Affidavit of the Mother, custody at the divorce proceedings was not given to Father, as opposed to the Mother, but by agreement of the Mother. There never has been any finding in any Court that there is a more suitable custodian than the Mother. The divorce proceedings was a default pro-

ceeding. As between the Father and the Mother, the Father got custody. To maintain the status quo pending the appeal, the Supreme Court must resurrect the Father. (Mother's September Affidavit, P. 1; Mother's July Affidavit, P. 1).

XXV

That contrary to the Grandmother's Affidavit, the Children have been willing, happy, even eager to visit their Mother in spite of the efforts of the Grandparents to make the Children feel otherwise. (Mother's September Affidavit, P. 3).

XXVI

That contrary to the Grandmother's Affidavit, the Children are not well adjusted in the home of the Grandparents. Their behavior is abominable with language and actions totally outside the realm of that of Children guided by adequate authority. (Mother's September Affidavit, P. 5).

XXVII

That the Defendants perpetrated misconceptions, misstatements of the law and misstatements of the facts upon the Supreme Court of North Dakota with no notice to the Mother and in a clandestine manner in order to undo that done in the legal manner in the District Court of North Dakota. That the misrepresentations were even worse perpetrated upon the Mother who then led the Children one way while they were pulled another by the Grandparents. That the Grandparents have shamefully used these two small children in a manner adverse to the Children's best interest to fill a void left by the death of their son. That the deception alone is evidence of harmful effect of the Grandparents on the Children.

XXVIII

That the Mother's parental rights to authority over the Children has been terminated by the Supreme Court in an effort to maintain a status quo which is in fact other than is represented by the Defendants.

XXIX

That the Mother gave up custody to the Father and no others. That she has not relinquished any other rights. That the Father being now deceased, she is the only person with custody of the Children. (Mother's September Affidavit, P. 6).

XXX

That the Mother's authority remains in existence by virtue of North Dakota Century Code 14-09-20 until the Court appoints a guardian, until the Children marry, or until the Children reach majority. None of the events which trigger the cessation of parental authority have occurred.

XXXI

That the Mother's rights have not been terminated pursuant to North Dakota Century Code 27-20.

XXXII

That should the Stay remain and the Children continue to be withheld from the Mother, the Mother's rights and authority to supervise the Children will in fact be terminated by the Supreme Court decision - a decision made without the benefit of testimony, without the benefit of an opportunity to evaluate the credibility of the parties, a decision based on misrepresentation, a decision contrary to that of the District Court Judge who not only

saw the parties, and heard the testimony but reviewed the decision in light of the Petition for Reconsideration and in so doing determined that the Children will not be harmed by remaining with the Mother. (Memorandum Opinion, September 12, 1980).

XXXIII

That if the decision of the Supreme Court stands psychological parenting in one or more of the changing cast of characters in the Pailing home will indeed begin. By the time an appeal is heard and perhaps a new hearing ordered with its concomitant long discovery, the Mother will have an insurmountable burden to meet, one created by the Supreme Court at 4:45 P.M. on September 12th without notice to the Plaintiff or participation by the Plaintiff without termination of her rights by statute or cessation of her parental authority.

Because of the foregoing, the provisions of Appellate Rule 27(b) apply and the Stay of Execution Pending Appeal granted on September 12, 1980, should be vacated.

Dated this 19th day of September, 1980.

/s/ Sherry Mills Moore
Sherry Mills Moore
Attorney for Jenny Mansukhani
Box 518, 110 North 3rd Street
Bismarck, North Dakota 58502

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

File No. 9855

Jenny Mansukhani,
Plaintiff and Appellee,

vs.

Donald and Jean Pailing, Sandy Pailing, Jane Doe
and Richard Roe,
Defendants and Appellants.

ORDER

A Motion to Vacate Stay of Execution in this case was filed by the plaintiff:appellee on September 19, 1980. Consistent with the Court's request defendants/appellants filed a Return to that Motion on September 25, 1980. Plaintiff/appellee filed a Reply to the Return to the Motion on September 26, 1980. After consideration the Court;

ORDERED, the Stay previously granted remain in force and effect, that the Motion to Vacate the Stay be denied, and that the case be set for hearing the last day of the November 1980 Term of the Supreme Court.

The Supreme Court of the State of North Dakota convened at 4:00 p.m., this 29th day of September, 1980, with the Chief Justices, the Honorable Ralph J. Erickstad, Justices, the Honorable Wm. L. Paulson, the Honorable Vernon R. Pederson, the Honorable Paul M. Sand, the Honorable Gerald W. VandeWalle, and the Clerk of the Supreme Court, Luella Dunn, being present and directed the entry of the above order.

Luella Dunn, Clerk
North Dakota Supreme Court

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Case No. 9855

Jenny Mansukhani,
Plaintiff-Appellee,

vs.

Donald and Jean Pailing, Sandy Pailing, Jane Doe,
and Richard Roe,
Defendants-Appellants.

PETITION

Jenny Mansukhani through her counsel petitions the Court for clarification of the meaning of the Order refusing to Vacate and the Stay of the Judgment in this matter.

It has been interpreted by the grandparents and their counsel to mean that the weekend custody granted Jenny Mansukhani by the Divorce Decree is no longer effective.

Would the Court also rule on whether the mother can hire persons bigger than the grandparents to go get her children who are presently being held by the grandparents because they are bigger than the mother?

It has been interpreted by Judge Glasser as being so confusing as to limit any action by him at the District Court level.

In the meantime, the children of Jenny Mansukhani are getting advanced lessons in profanity plus she is not allowed to talk to them if she manages to find where they are concealed.

We petition the Supreme Court for a hearing on visitation rights of the lawful mother and custodian of the children jointly with the deceased father.

Dated this 2nd day of October, 1980.

/s/ Sherry Mills Moore

STATE OF NORTH DAKOTA
Supreme Court
Bismarck

Clerk of the Supreme Court
Mrs. Luella Dunn

October 8, 1980

Ms. Sherry Mills Moore
Attorney at Law
Box 518
Bismarck, ND 58502

Re: Mansukhani v. Pailing, et al.
#9855

Dear Ms. Moore:

The Supreme Court has considered the document entitled "Petition" accompanied by Notice which you filed on October 2, 1980.

I am directed to advise you the Petition is denied. The previous stay order issued by this Court is limited to the change of custody order of Judge Glaser.

Sincerely yours,

/s/ Luella Dunn
Luella Dunn
Clerk of the Supreme Court

LD:cf
cc: Mr. Daniel J. Chapman
cc & enc: The Honorable Gerald G. Glaser
cc: The Honorable Ralph J. Erickstad

STATE OF NORTH DAKOTA
COUNTY OF BURLEIGH

IN DISTRICT COURT
SOUTH CENTRAL JUDICIAL DISTRICT
CIVIL No. 29959

Jenny Mansukhani,
Plaintiff,

vs.

Donald and Jean Pailing, Sandy Pailing, Jane Doe and Richard Roe,
Defendants.

NOTICE OF MOTION AND MOTION FOR ORDER

Based upon the files and records of this lawsuit together with those attached hereto, and

Whereas by the divorce decree granted October 4, 1977, Jenny Mansukhani was granted reasonable visitation including custody overnight and on weekends, and

Whereas the Supreme Court of North Dakota has in effect not taken jurisdiction over issues of visitation, and

Whereas Jenny Mansukhani has sought and been denied visitation overnight and on weekends,

Jenny Mansukhani hereby moves this Court for an Order directing that Jean Pailing, and Donald Pailing deliver Jennifer Pailing and Allen Anthony Pailing at 3201 East Rosser Avenue, Bismarck, to Jenny Mansukhani at 5:00 P.M. each Friday to be returned to the same address at 8:00 P.M. each following Sunday.

Dated this 9th day of October, 1980.

/s/ Sherry Mills Moore
Sherry Mills Moore
Attorney for Jenny Mansukhani
Box 518, 110 North 3rd Street
Bismarck, North Dakota 58502

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

File No. 9855

Jenny Mansukhani,
Plaintiff and Appellee,

vs.

Donald and Jean Pailing, Sandy Pailing, Jane Doe, and Richard Roe,
Defendants and Appellants.

ORDER

A Petition for Temporary Stay and for Hearing on Stay of Execution with Affidavit in Support was filed by counsel for the appellants in this case. The Court considered the petition and construed the order referred to this Court to mean that the previous stay issued by this Court has been modified by the order of the Honorable Gerald G. Glaser of 17 October 1980. As such it would lead to confusion and disarray and it is hereby

ORDERED, that the Order of the Honorable Gerald G. Glaser dated 17 October 1980 be stayed pending further order of this Court.

IT IS FURTHER ORDERED that the matter be set for hearing on the last day of the November 1980 Term of the Supreme Court at which time the merits of all issues pending before this Court raised by these parties in connection with the above shall be heard.

The Supreme Court of the State of North Dakota convened at 3:30 p.m. this 17th day of October, 1980 with the Chief Justice, the Honorable Ralph J. Erickstad; the Honorable Wm. L. Paulson, the Honorable Paul M. Sand,

Justices; and the Deputy Clerk of the Supreme Court, Catherine Fox, being present and directed the entry of the above order.

/s/ Catherine Fox
Catherine Fox
Deputy Clerk
Supreme Court

IN THE SUPREME COURT
STATE OF NORTH DAKOTA
CASE No. 9855

Jenny Mansukhani,
Plaintiff-Appellee,

vs.

Donald and Jean Pailing, Sandy Pailing,
Jane Doe, and Richard Roe,
Defendants-Appellants.

MOTION TO VACATE STAY PURSUANT TO RULE 27(b)

Sherry Mills Moore being first duly sworn, deposes and says that she is the attorney for the Appellee in the above matter; that she represented the Appellee at a hearing on October 17, 1980, before the Honorable Gerald Glaser, scheduled by this Appellee for the purpose of enforcing visitation privileges as decreed by the Honorable M. C. Fredericks on October 4, 1977. That the hearing was necessitated by refusal of the Appellants (Grandparents) to allow the Appellee (Mother) to visit her children other than for several hours in the presence of a third party. That notice of the Mother's intent to exercise her visitation rights for weekends and overnight was served upon Grandparents. The Grandparents refused the visitation. The Mother through counsel then petitioned the Supreme Court for a clarification of whether their stay of *September 30, 1980,* stayed the Mother's visitation. The Supreme Court on *October 8, 1980,* denied the petition and directed that "(T)he previous stay order issued by this Court is limited to the change of custody order of Judge Glaser". Given this assurance that the Supreme Court had not stayed visitation, the Mother then sought

enforcement of the visitation in the District Court by Motion. The hearing was held October 17, 1980, at 11:30 A.M. Testimony was presented and arguments had. Judge Glaser ordered that the Mother be allowed reasonable visitation including overnight and weekends. He refused to specify how many weekends per month probably because of the Grandparents repeated assurance that a visitation schedule could be worked out.

His decision was based on a finding that the Mother's visitation privileges had never been modified during the life of the Father and the Father's death did not of itself diminish those rights.

The obvious practice developed by the Grandparents in this matter of presenting evidence to the Supreme Court not presented at the District Court hearing on the same matter is tempting to the Mother but because viewed as erroneous, will not be indulged in. Thus, while the Mother could present affidavits and letters of many people showing the children were happy in their visits with her, eager to stay and eager to return, she will not do so. The affiant will however present law on that evidence so produced by Appellant in their Petition for Stay. Dr. Burger was a witness in *Gardebring v. Rizzo,* 269 NW2d 104 (ND 1978). He expressed his view on the role of the noncustodial parent, "The best solution for a child of a divorced couple would be to give the child to one parent, and for all practical purposes consider the other parent as non-existent."

The Supreme Court rejected his view in the same case. Letters from this same person accompanied the Petition for Stay. They were not presented at trial probably because of obvious hearsay. Had an opportunity for cross examination been allowed, the basis for his opinion could have been explored and his bias exposed. Fortunately,

this Doctor's bias has been reviewed by this Court before. Had the letters been presented, the District Court may have found them sufficient to suspend the Mother's visitation in the interest of the children. They were not then presented. *Their basis is unknown. Unexamined testimony by a party with a bias based on beliefs other than the law should not be used to circumvent the findings of a Court based on legally presented evidence.

The Appellant moved the District for a stay. The District Court denied the stay because it would not preserve the status quo - the Mother's existing legal rights to visit the children.

The Order of Judge Glaser was that the Mother be allowed reasonable visitation of her children including weekends and overnight. Judge Glaser made no order giving the Mother custody. Because the Supreme Court's Order of *September 30, 1980,* stayed only change of custody as per *the Supreme Court letter of October 17, 1980,* the allowance of visitation in no way modified the Supreme Court Order. The stay of October 17, 1980, should be vacated.

Dated this 20th day of October, 1980.

Respectfully submitted,

/s/ Sherry Mills Moore
Sherry Mills Moore
Attorney for Jenny Mansukhani
Box 518, 110 North 3rd Street
Bismarck, North Dakota 58502

Subscribed and sworn to me this 20th day of October, 1980.

/s/ Agatha J. Horner
Agatha J. Horner, Notary Public
Burleigh County, North Dakota
My Commission Expires 10/11/83

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

File No. 9855

Jenny Mansukhani,
Plaintiff-Appellee,

vs.

Donald and Jean Pailing, Sandy Pailing,
Jane Doe, and Richard Roe,
Defendants-Appellants.

ORDER

A Motion to Vacate Stay Pursuant to Rule 27(b) was filed with the Supreme Court in this case on October 20, 1980, by counsel for the appellee. After consideration the Court:

ORDERED, that the Motion to Vacate Stay pursuant to Rule 27(b), submitted on behalf of Jenny Mansukhani, be and the same is hereby denied.

The Supreme Court of the State of North Dakota convened at 10:45 a.m. this 21st day of October, 1980, with the Chief Justice, the Honorable Ralph J. Erickstad; the Honorable Paul M. Sand, the Honorable Gerald W. VandeWalle, Justices; and the Deputy Clerk of the Supreme Court, Catherine Fox, being present and directed the entry of the above order.

/s/ Catherine Fox
Catherine Fox
Deputy Clerk
Supreme Court